Address of the President

EDGAR H. FARRAR
of New Orleans, Louisiana

before the

American Bar Association

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Gentlemen of the American Bar Association:

Since your last annual meeting the Sixty-first Congress of the United States held its second regular session, and the Sixty-second Congress was sitting in extra session when this report was written. It adjourned after the first draft of this address was in print.

The regular session has produced less than a dozen statutes of general importance. The most noteworthy of these is the new judicial code which abolishes the circuit courts, concentrates the *nisi prius* jurisdiction in the district courts, and revises, amends and re-enacts the statutes pertaining to the judiciary of the United States. A paper on this legislation by a learned ex-justice of the Supreme Court of the United States is part of the program of this meeting.

Another of these statutes provides for the purchase or erection in foreign countries of embassy, legation and consular buildings, at a maximum cost of $150,000 each, so that hereafter the representatives abroad of the nation will be housed in a manner that comports with the dignity and power of the American people.

In another statute the honor and dignity of the nation is upheld in a humbler sphere at home by making it a misdemeanor for the proprietor or manager of any theatre, or place of public amusement, to make any discrimination against any person lawfully wearing the uniform of the United States in any military or naval branch of its service. The scope of this statute of course is confined to the District of Columbia, the territories and the insular possessions of the United States. New York and Pennsylvania, at the last session of their legislatures adopted a

similar statute, and the other states will doubtless follow in their wake.

The extra session passed the Canadian Reciprocity Act, the Apportionment Bill and a stringent statute requiring the publication of campaign contributions and expenses.

During a visit to Washington in February, I took up with Chief Justice White the question of appointing a committee to revise the rules of practice in equity in the Federal Courts, and learned that the court had already considered the matter and had determined to appoint such a committee. Before adjournment the committee was announced by the court consisting of the Chief Justice and Justices Lurton and Van Deventer. This committee has issued a circular letter, requesting assistance and suggestions from the members of the Bar, and it is to be hoped that this request will meet with a hearty response. The court has, under the statute, the fullest power to regulate the whole practice in equity; and we may therefore live in the just expectation that the labors of this committee of distinguished judges, aided by the whole Bar, will result in giving the country a system that will respond to the demand for reform in that important branch of legal procedure.

Forty-one states, two territories and three insular possessions have had legislative sessions this year, and in some of the states these sessions have been unusually prolonged. In Tennessee the session was interrupted by a legislative strike. Thirty-four members, enough to break the quorum, left the state and remained for a considerable time outside of her boundaries. The legislature of New York is now in recess, and the legislatures of Connecticut and Georgia are still in session.

As a result of all this legislative activity, more than nine thousand statutes have been added to the aggregate of the laws of our country. Most of them are local, trivial and formal. Those of them of general interest are set forth in the appendix. As an illustration of the manner in which all of this legislative activity is regarded, one of the Vice-Presidents, in making to me his report for his state, says, "Thank the Lord our Legislature did not meet this year."

However, there is one strident note of a new radicalism sounded in some of this legislation, which must not be passed unnoticed in an assemblage of lawyers. It comes from a territory seeking to become a state, and was immediately taken up by the great State of California. I refer to the recall of judges by popular vote. Arizona has put into her constitution a clause permitting the unseating of a judge by a vote of the people, and the legislature of California has proposed to the people of that state an amendment to her constitution containing a similar provision. The period of transmission of this virus from a territory to a state has been short. Whether the disease will progress further is to be seen.

It is difficult for one brought up in the traditions of our free American republics to find language properly to characterize this radical intrusion. If the judiciary of this country were in any material part corrupt, or if there were in our system of laws no effective means to remove corrupt or ignorant judges; or if the means provided had been appealed to in vain and could not be made operative, then there might be some excuse for a revolutionary measure of this character. But none of these things is true. The constitutions of the states provide the most ample machinery for the removal of judges, either by address out of office, or by impeachment. This power is put in the hands of the legislative branch of the government which derives its mandate at short intervals immediately from the people; and yet how seldom in the history of the Federal Government, and how seldom in the history of the forty-six states of this union, in spite of all the bitterness that enters into our politics, has the exercise of this power been even invoked? Is not this record of itself a tribute to the American Judiciary? Of course, from time to time there arise examples of the Homeric Thersites who attempt to besmirch the ermine worn by the greatest judges and the greatest courts. Without exception, however, their winged words have had but a short flight. The proposed measure would furnish a perpetual audience to men of this kind, and worst of all an audience with power to act. It is an assault on the citadel of law and order. It is an attempt to destroy the inde-

pendence of the judiciary, without which true liberty—the liberty which is regulated by law, enforced with reason and deliberation, cannot exist, and to substitute the opinion and the passions of the mob. It drags down the Goddess and sets the hydraheaded Demos on the throne of justice, and enables the ignorant suffragan to ostracise a judicial Aristides, because he is tired of hearing his judgments called just.

It will not be amiss to quote here the words of Chief Justice Marshall spoken in the Virginia Constitutional Convention in 1829. He said: "The Judicial Department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all. Is it not to the last degree important that a judge should be rendered perfectly and completely independent with nothing to control him but God and his conscience? I have always thought from my earliest youth till now that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a *sinning* people was an ignorant, a corrupt or *a dependent* judiciary." The wise and brave words uttered by President Taft in his veto of the bill admitting Arizona into the Union will pass into the political classics of our country, and, if reason has not gone from the minds of the people, will act as a complete antidote to this new social poison.

It is more than probable that this proposed legislation is one of the symptoms of the political, social and economic unrest that pervades the whole nation. The burning question that now agitates the mind of the American people is how to control the corporations; how to break up those great aggregations which seem to be almost as powerful as the government itself, and how to prevent their formation in the future. These ends are sought both by radicals and conservatives. The radicals of course propose to destroy things generally, regardless of consequences, and one of them gnashes his teeth in the July North American Review because the Supreme Court of the United States extended the time within which the hundreds of millions of capital invested in the Standard Oil Company could be withdrawn without destruction from a combination condemned by the court. The conservatives read the signs of the times, realize the

danger of the growing excitement among the masses of the people, and are seeking an exit from the situation that will conserve political liberty and industrial prosperity.

The stock-corporation is now an absolutely essential piece of machinery in commerce. Without it the great affairs of modern times would not have been undertaken, and if undertaken would not have been accomplished. The outlet afforded by this means to the investment of private capital in great enterprises affected with a public interest, such as railroads, canals, insurance companies, etc., is regarded by some publicists as holding an intimate relation with our democratic system. Otherwise the necessities of society, subserved by these great enterprises, would have been ministered to by the State, and we should have had long ago in this country a state socialism or collectivism, that does not comport with the American idea of individual liberty. In this connection, the American Publicist, Ezra Seaman, said in 1864, that the great railroad and canal companies were the only means of preventing governmental occupation of these important enterprises and that, consequently, they ought to be regarded as bulwarks of liberty against the encroachments of arbitrary power and as security against revolution and anarchy.

A distinguished political economist has said that on the day when the transferable share of stock was invented, there began a real economic revolution. It was this device which gave liquidity to capital, and hence promoted the circulation of values, one of the greatest acknowledged causes of the increase of wealth. When this device was united to the conception of the civil law of a *corpus societatis,* a legal entity, a fictitious person, created by authority of the sovereign power, having its own existence, its own property, its own rights, powers and responsibilities, absolutely distinct from and independent of the existence, rights, powers and responsibilities of any or of all of its constituent members, there began the modern conception of a business corporation. The conception is completed by the addition of the limited liability of the stockholders.

The Italian tax-farmers of the 16th century were the first to use the stock-company with transferable shares. An analogous

system had been in use as early as the 14th century in respect to partnerships *in commendam*, and to the division of the interests in such partnerships in equal and transferable shares.

The charter of the East India Company in 1600 appears to be the first approach to this form of corporate organization used in England.

Two years later the Dutch India Company was created by Holland on the same basis; and shortly afterwards similar corporations were organized in France. It is to be noted that the stock corporation in those days was used only for the exploitation of great colonial enterprises, and the corporations created for these purposes were in the nature of public corporations. Two generations later, in 1664, maritime insurance companies were organized in France, and in 1694 the Bank of England obtained its first charter. Corporate development received a great shock in both England and France in the first quarter of the 18th century by the almost simultaneous growth and simultaneous bursting of the South Sea Bubble in England and Law's Mississippi Bubble in France. In England, during the South Sea excitement, there grew up a large number of unauthorized and what, from their objects and purposes, may be called fraudulent voluntary joint stock companies. This led to the prohibitory act of 1720, vulgarly known as the "Bubble Act," and although only a few corporations for business purposes had been created, or, as we should rather say, in view of their lack of authority, had been attempted to be created, by the colonial governments in America prior to 1741, in that year the provisions of the Act of 1720 were extended to the American Colonies. The effect of this act was to prevent legally all corporate development in the Colonies until after the revolution, and practically until after the adoption of the Constitution. The large commercial enterprises of colonial times were prosecuted by voluntary associations organized as stock companies, resembling in many respects the *commandae* originating in the Middle Ages.

Prior to 1850, the general statement holds true that the governments of the great commercial nations were chary of granting

corporate privileges for commercial purposes. These grants were usually conferred upon banks, insurance companies, railroads, canals, water-supply companies, gas companies, bridge and turnpike companies. There were a few mining and manufacturing companies. The general free incorporation law in England dates from 1856, in France from 1863 and in Germany from 1870. At that time, 1850, there were no general incorporation laws for purely private purposes in a large majority of the states then forming the American Union.

This reserve in regard to grants of corporate life and power was doubtless due to a prejudice, wide spread among the people, against the creation of such artificial persons in commerce. Whether there was an instinctive dread of such organizations, or whether this prejudice grew out of the fact that to the great trading companies organized in the 16th and 17th centuries were usually given monopolies or special and exclusive privileges which were abhorred by the public, is difficult now to determine. As early as 1688 the people of Massachusetts protested against the granting by the Crown of a charter incorporating a trading company with power to open mines in New England, and the ground of their objection was that any such charter tended to create a monopoly and enhance prices. In 1717 the law officers of the British Crown advised against the incorporation of a marine insurance company as a dangerous experiment; and it was only after evidence had been laid before the attorney-general three years later, showing that more than one hundred and fifty private insurers had failed, that the Act of 1720 incorporating two such companies was adopted. The second half of the very act incorporating these companies contains the prohibition against corporate organizations which have given that act the popular name of the "Bubble Act."

The same prejudice makes its appearance in the decree of the 20th Germinal of the Year II by the French Convention which prohibited the formation of stock companies by anybody or for any purpose whatever.

In spite of all the enormous corporate development that has taken place in this country and in England in the last half

century, and in spite of the reckless throwing down by the states of this Union of all the barriers anciently maintained against the indiscriminate organization of business corporations (on which I shall comment later), there has always been among the masses of the people a strong bias against corporations, manifesting itself in the verdicts of juries, and sometimes in the opinion of the courts. This bias has now passed over into politics, and the favorite ground of attack by the demagogue on anybody in public life, or on anyone who desires to enter public life, is that he represents corporate interests, or that he is a corporation lawyer.

By a short review of the corporation laws of this country I shall demonstrate that the people themselves are responsible for the conditions of which they now complain; that if there are Frankensteins in corporate form stalking over the land, spreading terror and threatening destruction, the people themselves have created them by their duly accredited representatives in the legislatures of the states.

In forty states, corporations may be organized for any lawful business or purpose.

In forty-one states there is no superior limit on the capital stock of a corporation. In only eleven states is there an inferior limit ranging from $1000 to $10,000.

In twenty-four states perpetual charters are permitted, and in most of the others charters limited as to time may be renewed again and again.

In seventeen states the merger or consolidation of corporations is specially permitted. It is specially prohibited in only two states.

In nineteen states the power to hold stock in other corporations is broadly given. It is specially prohibited in only two, and given under restrictions in seven.

In thirty-nine states there is no provision that any part of the capital stock shall be paid in money, either before the corporation becomes a going concern, or at any period in its history. One state provides for the payment of $1000 in money, three provide that ten per cent, one that twenty per cent, one that

twenty-five per cent and one that fifty per cent of the capital stock shall be so paid.

In thirty-eight states, by statute, and in three by jurisprudence, it is provided that stock may be issued for property, and in most of them for labor or services as well. In only fourteen states is the issue of fictitious stock declared void. In nine states the judgment of the board of directors as to the value of the property for which stock is issued is declared conclusive, except in case of actual fraud; but the stock is not declared void. In Montana any arbitrary value whatever may be placed on a mine for which stock is issued. In Iowa, Massachusetts, Texas and Virginia only is any state supervision exercised over the issuance of stock for property.

In twenty-one states corporate meetings may be held either within or without the state of incorporation.

Annual financial reports are required to be made to a state officer in eleven states. In eighteen states is required an annual report containing nothing but certain formal matters such as the name and domicile of the company, the names and residences of officers and the amount of capital stock.

In none of the states is any provision made against the same persons acting as directors in corporations of the same character and engaged in the same business.

In thirty-two states there are no provisions requiring any of the directors of a corporation to be residents of the creating state. Eleven states require one director, two states three directors and two states a majority of the directors to be residents of the state.

During the last ten years there seems to have been a competition between the states as to which of them would be able to invent and adopt the most unrestricted corporation laws. The spur to this competition has been a greed for revenue, and the encouragement lay in the success of the State of New Jersey, which was the pioneer in this legislation. Out of her bosom have come the great trusts, the holding companies and the gigantic monopolies, all with their water-logged capital stocks. But there are now eight other states prepared to compete with her in the launching of similar piratical craft upon the sea of commerce.

The corporation laws of the United States, for the incorporation of companies in the District of Columbia, and the National Banking laws contain many of the objectionable features of the state incorporation laws.

In the District of Columbia a corporation without limit as to capital stock, and without limit as to corporate existence, may be formed for any enterprise or business which may be lawfully conducted by an individual, except to buy, sell or deal in real estate. The power to consolidate with other companies is not given, and the holding of stock in other corporations is prohibited; and here too there is an absence of prohibition against the identity of directors or officers of corporations of the same character, and against the holding of their stocks by other corporations.

Under the National Banking laws there is no limit to the capital stock. Corporate life is for twenty years but may be renewed an indefinite number of times. National Banks cannot hold stock in other corporations, but there is no provision against other corporations holding stock in National Banks, and no provision against the identity of the directors in two or more banks. Merger or consolidation of banks is not provided for.

It thus appears that by the law of the land there stands prepared all the legal machinery apt to the hands of the unscrupulous to create combinations and monoply, to concentrate wealth and power in a few hands, and to defraud the unthinking investor with wind-blown stock.

In New York, under whose laws a perpetual corporation with unlimited capital stock, with the power of merger, and with the power to hold stock in other corporations, can be formed for any lawful purpose or purposes, except to practice law, or to employ attorneys to perform legal services, they have begun to incorporate estates. If this is lawful there, it must also be lawful under the statutes of many other states whose laws are similar. Is not this a form of mortmain contrary to the fundamental principles of Anglo-Saxon government? How will it stand with the Republic in a generation from now if the estates of all the millionaires and multi-millionaires are perpetually incorporated?

In some of the agricultural states great planting companies are organized, which absorb farm after farm, until their land holdings approach a principality in extent. How can that firmest foundation of free government, a land-owning yeomanry, exist under such conditions? Down into the hearts of all English-speaking people have sunk the picture of "The Deserted Village" and the words of its author pronouncing accursed the land "where wealth accumulates and men decay."

Under the power to create corporations with unlimited capital stock, either directly or by consolidation, great aggregations of capital have been formed which have seized upon specific industries and driven everybody else out of them. They stand like armed colossusses astride the gateways of commerce and destroy every entrant who presumes to compete with them. They have no legal grant of monopoly, but monopoly comes to them by virtue of their size, organization and strength, just as surely as monopoly went to the East India Company by Royal Grant.

No honest wise man will enter into competition with them, and only the dishonest would-be-wise man attempts it sometimes, merely for purposes of blackmail. Which makes for the public good the more: To have employed in one industry in which capital and labor can be profitably invested, five hundred corporations with a capital of three millions each, or one corporation with a capital of fifteen hundred millions? The proposition is not discussable as long as our inherited ideals of what our democratic civil society is, or ought to be, remain unchanged.

Whether these enormous corporations are formed by original incorporation, or by consolidations or merger, or by the holding of the capital stocks of other corporations, the economic result is the same. Each of these forms spells practical monopoly. The result reached rather than the method of reaching the result is what concerns the public, and no amount of technical reasoning will convince the people that a monopoly produced by one of these methods is any different from a monopoly produced by any other of them. Hence all these large corporations are popularly regarded as public enemies, and there is a general belief that if the republic does not slay them, they will slay the republic.

We may almost say of them what Sir John Culpepper said in the Long Parliament of the monopolies of his time:

"They are a nest of wasps—a swarm of vermin which have overerept the land. Like the frogs of Egypt they have gotten possession of our dwellings and we have searce a room free from them: They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-vat, wash-bowl and powdering-tub. They share with the butler in his box. They will not bate us a pin. We may not buy our clothes without their brokerage. These are the leeches that have sueked the commonwealth so hard that it is almost hectieal."

The economie advantages, if any, that flow from these vast aggregations of eapital, are drowned in the firm belief that they exereise too mueh political power, that they exereise sueh power selfishly and unserupulously, that they bar the door to private enterprises, blight local industries, eramp the industrial freedom of individuals, destroy equality of opportunity and extinguish all hope and henee all ambition for industrial independenee and autonomy. The law of the survival of the fittest is the Divine law of progress and development in nature. It is the law of human soeiety, and particularly of trade and eommerce, which makes modern society possible. Contest and eonfliet, the death of old and the birth of new forms are essential to the working of this law, and the predominance of any foree in commerce operating to destroy the benign germs of eommereial ferment, must exercise a deterrent effeet on the growth and progress of any free people.

But the great Ameriean national disgraee is found in the issuanee of fietitious or watered stock. This is made possible by those eorporation laws whieh provide no governmental supervision over the organization of eorporations, whieh require no part of the eapital stoek to be paid in money, and which permit the issuanee of stoek at the pleasure of the organizers and directors for property, labor and serviees at such valuations as they may ehoose to place on them. It is known that one of the earliest industrial eombinations of thirty years ago issued to its promoters $10,000,000 in stoek for a patent whieh was not worth

a copper cent, and which was never used in the operations of the company. The revelations made by the Congressional probe now penetrating the history of two of the greatest industrial combinations of modern times are of the most unsavory nature. Indeed, I believe, it can be truthfully stated that, under the pretense of anticipating a future earning value, it is the fashion to insert from twenty to sixty per cent of water into the organization of all corporations whose stocks are exploited on the great financial markets. In the notorious Chicago & Alton Railroad deal, the Interstate Commerce Commission found that $62,660,000 of stocks and securities were issued for which the corporation received no value whatever. The proportion of water in that case exceeded 54 per cent.

The lax corporation laws above enumerated give rise to a host of fraudulent corporations which are exploited through the mails and the various advertising media. The post office authorities are kept busy hunting down these swindles. They have duly attested charters, corporate seals, and handsomely engraved securities. If one should communicate with the public officials of the state of their domicile, the answer would be that such corporations are organized in due form of law with a named capital stock. No sworn public reports of these corporations being required, except in a few states, no information, as a rule, can be obtained of their condition. One reads with amazement of the objects and purposes of the fraudulent companies organized in England during the South Sea excitement, and of the gullibility of the subscribing public; but such things are going on in this country all the time. The last scheme unearthed is that of a million dollar company to manufacture and sell an anti-bug chalk, that is a chalk which will make a mark that no bug will crawl over. Wonderful new processes of manufacture and miraculous results to be produced by the mysterious power of electricity are the favorite bait used by the corporation fakirs to catch the gudgeon investor.

To my mind, the most vicious of all the provisions in the statutes above enumerated is that authorizing one corporation to own and vote stock in another. This provision is the mother

of the holding company and the trust. It provides a method for combining under one management and control corporations from one end of the nation to the other. Before these statutes were passed, the courts of the country had held with great unanimity that it is against public policy for one corporation to hold and vote stock in another, and the general ground of the doctrine is that such stockholding tends to restrain trade and to foster monopoly. That this doctrine is true has been demonstrated by the fact that most of the great trusts have clothed themselves in the form of holding companies.

One of the most remarkable of these stockholding statutes is that passed in the State of Utah in 1907, amending section 5 of chapter 26 of the laws of 1901, and giving to Utah railroad companies a power to acquire stock in other corporations so broad and unlimited that under it a Utah railroad company can acquire and control the stock of all transportation corporations by land, river, lake or sea in the United States, even down to the smallest tramway in a country village; of all terminals, wharves, docks or other shipping facilities; of all express companies; of all refrigerator lines and refrigerator plants; and of all corporations that manufacture, sell, lease or otherwise provide railroad equipment. The only limitation on this grant is that it shall not extend to the ownership of stock or securities of a parallel and competing line of railroad *situated within the State of Utah.* When one remembers that Utah is the domicile of the Union Pacific Railway Company, and that this statute was passed after that company had acquired large blocks of stock in eight of our great railroad systems, one immediately discerns in this legislation the lion's paw—the masterhand of the now-deceased president of that company.

As regards quasi-public corporations, which are under, or which can be put under strict governmental supervision and control, and whose rates can be regulated by law, the right to hold stock in other similar corporations does not lead to the same consequences as in industrial private corporations, which are exempt from any such regulation; and therefore these corporations require in this regard, a somewhat different treatment from industrial corporations.

It is no uncommon thing to see corporations organized under the laws of one state that do not operate in that state at all, that own their property, conduct their corporate business and hold their directors meetings in other states, and that have no connection with the state of their origin except perhaps to conduct an annual meeting of stockholders by proxy. There are hundreds of corporations of this sort in several of the states, particularly in New Jersey.

This is the result of those statutes which permit corporate meetings outside of the domicile of the corporations.

This power, coupled with the absence of prohibition of the same persons serving as directors in corporations of the same character engaged in the same business, and the absence of requirement that directors shall be residents of the state of a corporation's domicile, is just as effective to produce a trust or a combination in restraint of trade as a holding company.

The majority stockholders in many corporations in many states can combine expressly, or by what is called a gentlemen's agreement, and elect the same board of directors and the same officers in all the corporations. This board of directors can sit in some central city, and govern all the corporations as if they were one.

Of what avail will it be to break up the Standard Oil Company and the American Tobacco Company into their constituent elements, if all these constituent elements have identical stock holders, a community of interests, and the legal power to establish substantial identity of directors among them?

Each constituent will claim that it has selected from among its stockholders the most expert and experienced persons to manage its affairs, and that the selection of the same persons in all the corporations is a mere coincidence, resulting from the operation in each one of identically the same causes. Such a proposition is difficult to meet, and can only be overthrown by evidence to show that all of these elements are in fact acting in the same perfect harmony that characterized them when they were governed by the parent company. To prove this means other government suits and more years of litigation.

Is there a remedy for all these evils? Manifestly, there is, and it lies in the source from which the evils have sprung, that is, in modifying the corporation laws of the various states. Concerted action among the states will end all the trouble. If every state in the Union will purge its corporation laws of all objectionable features, then the breeding places of industrial monstrosities are destroyed. If every state under whose laws these monstrosities have been brought into being will exercise its reserved power over corporations and compel them either to conform to the new regime or to dissolve and liquidate, then the existing crop will be destroyed without hope of successors. The doctrine of Dartmouth College *vs.* Woodward, that a corporate charter is a contract, and cannot be repealed or substantially modified by the legislature without the consent of the corporation, has been rendered inapplicable in practically all the states by the reservation of the right of repeal or modification.

It appears to me that it would require but a small amount of constructive statesmanship to bring about a state conference and united action on this grave subject. Even if the Commission on Uniform State Laws, in whose work this Association takes such a large part, can ever agree on a uniform corporation law, it is doubtful whether it can exert the moral or the political power to get it adopted without such a conference among the states. This is work for the "House of Governors," which assembles this year on September 12.

Every state in this Union is sovereign in every respect except in so far as it has surrendered its sovereign powers to the Federal Government. Over its own domestic affairs, including all intrastate commerce, it has absolute power under the restrictions imposed in the Federal Constitution. A state may arbitrarily exclude from her domestic commerce every foreign corporation, and in the face of such a prohibition such foreign corporations cannot enter the borders of the state at all, except when in the conduct of interstate commerce, which is exclusively under the control and regulation of the Federal Congress, or except when in the employment of the Federal Government. Of course this power of exclusion does not extend to the National

Banking corporations or the Federal railroad corporations which are instrumentalities of the Federal Government. Corporations of the District of Columbia are in the states on the same footing as any other foreign corporation.

If, therefore, the character of the corporations engaged in interstate commerce is unobjectionable, there is no valid reason why they should not be permitted to engage freely in all the states in both interstate and intrastate commerce. These forms of commerce are in many instances so intimately connected and so intricately interwoven that it is extremely difficult to draw the line of demarcation where one begins and the other ends, and the advantages of commingling them are manifest. And yet these two branches of commerce are respectively under the control of two separate and distinct sovereign powers, neither of which can intrude upon the sphere of the other, and neither of which can surrender its power and jurisdiction to the other. The corporations of other states and of foreign countries are generally permitted to engage in intrastate commerce in all the states, and this under a rule of comity which is derived from international law, but, as stated above, it is one of those rules which each state may apply, or not, at her pleasure. Nothing would be more hostile to that fraternal feeling which ought to exist between the component parts of this "republic of republics" —"this indissoluble union of indestructible states"—and nothing more injurious from an economic point of view, than a general corporation war between the states by which each state would absolutely exclude all the corporations of the other states from all participation in intrastate commerce. Nothing will more surely tend to provoke such a war than for a number of states to maintain a system of corporation laws, under which a pestiferous swarm of criminal corporations will be continually precipitated into all the channels of trade. In the absence of a hotbed in which to grow these vicious forms, there is absolutely no need for the exercise of any regulative Federal action, further than to prohibit and to punish unlawful combinations between otherwise unobjectionable corporations in interstate and foreign commerce.

Under Section 10 of Art. I, of the Constitution of the United States, the states of the Union, with the consent of the Congress, can enter into any agreement or compact with each other not in contravention of the Constitution itself.

This important clause in the Constitution of our country has been seldom used. Omitting certain agreements as to boundaries, the only instance I now recall is one in the acts of the 61st Congress authorizing the states to enter into agreements or compacts to conserve forests and watersheds of navigable streams flowing through their borders. It may be used to round out and settle many questions of interstate character not confided to the Federal Government, such as drainage, irrigation, land reclamation, levee building, sewage disposition, the conservation of forests, and sanitary measures such as the elimination of the breeding places of disease-and-damage-producing insects and animals. By the wise and beneficent use of this clause will disappear that "sphere of twilight," that supposed "no-man's-land, free from any legislative control by State or nation," which the New Nationalism invites the Federal Government to invade and occupy.

The framers of the Constitution were no such bunglers as this doctrine implies. They wisely left the unlimited power of compact among themselves with the states, and still more wisely subjected such compacts to the consent of the Federal power.

An agreement or compact among the states on the subject of their respective corporations, with the consent of the Congress, if properly drawn, and if it contains the consent of each state to be sued by the citizens of the other states in respect to the provisions of the compact, would be enforceable in the Supreme Court of the United States.

With such consent, they can, for a limited period, if necessary, agree upon a uniform system of corporation laws in all the states, and can provide uniform rules, conditions, fees and penalties under which the corporations of one state could engage in the domestic commerce of all the other states.

If such an agreement were reached and put into operation for a limited time, my personal belief is that, inasmuch as such a

great proportion of the business of this country is now conducted by corporations, it would go so far toward increasing the community of interests and the fraternal spirit between the people of the states, so far towards promoting the increase of business and of wealth, and so far towards removing all fear of drastic Federal regulation, that it would be continued indefinitely and would become one of the settled principles of our national polity.

If, however, the jealousy and greed of individual states is such as to prevent any such compact, or to prevent the adoption of statutes in every state which will eliminate the objectionable features from their corporation laws, then there is no other remedy but the prohibition by the other states of the participation of dangerous corporations in intrastate commerce, and the prohibition by Congress of the participation of such corporations in interstate commerce, so that their operations will be rigidly confined to the states which create them. The Congress having the sole and exclusive power to regulate interstate and foreign commerce, it is its manifest duty, when the occasion arises, so to exercise its exclusive power as to impose restrictions which will prevent abuses of that unlimited freedom which the courts declare now exists; because the Congress, by its non-action has willed that such unlimited freedom shall be the rule of such commerce. As was said by the Supreme Court of the United States in Crutcher *vs.* Kentucky 141, U. S., p. 58. "The prerogative, the responsibility and the duty of providing for the security of the citizens of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the Government of the United States and not to the governments of the several states; and confidence in that regard may be reposed in the national legislature without anxiety or apprehension, arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce."

Inasmuch as a corporation is not a citizen within the meaning of that clause of the Federal Constitution which declares that the

citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and inasmuch as a corporation cannot migrate beyond the boundaries of the sovereign that creates it except by comity, and inasmuch as the absolute power of the Congress over interstate commerce includes the power to prohibit, there can be no reasonable ground for doubting the power of the Congress to exclude from interstate commerce such corporations, as in its judgment, are harmful to that commerce, or to the public policy of the nation, or of the states in which they exploit their energies. Indeed Crutcher *vs.* Kentucky distinctly maintains the proposition; and, as an example of the exercise of the prohibitory power which has been declared constitutional, may be cited that clause of the Hepburn Act which contains a prohibition against the carriage in interstate commerce by a railroad of any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. By this act, the Congress established a public policy of its own in respect to interstate commerce, and struck down in respect to that commerce the public policy of those states which had joined to the faculty of the common carrier the faculty to mine, to manufacture, or to produce, otherwise than for the carrier's own use. It may establish in interstate and foreign commerce a similar public policy supereminent over the public policy of any state, in regard to any sort or kind of corporation which the public policy of the state may choose to create.

As was well said by Mr. Justice Bradley in the case of Stockton *vs.* Baltimore R. R., 32 Fed. Rep., p. 9, speaking of the extent of the power of the Congress over interstate and foreign commerce: "It is over the whole subject, unimpeded and unembarrassed by state lines, or state laws, and in this matter the country is one, and the work to be accomplished is national; state interests, state jealousies and state prejudices, do not require to be con-

sulted. In matters of foreign and interstate commerce there are no states."

Nor is this new doctrine, because in Gibbons *vs.* Ogden, 9 Wheaton, Chief Justice Marshall said of the same regulative power: "It is a power vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions in the exercise of the power as are found in the Constitution of the United States."

Therefore, the Congress can drive out of interstate and foreign commerce all corporations with fictitious or watered stocks, all corporations whose capital stock is so great as to constitute them practical monopolists or suspects of being such, all holding companies, and all companies whose stocks are owned and controlled by holding companies or by other corporations.

If it should become necessary for the Congress to adopt a corporation regulative act, that act should be drawn so as to destroy the existing evils, and so as to promote and not to hamper legitimate trade and commerce; and to this end the constructive statesmanship of all parties should co-operate. The demand of the people is for that degree of industrial peace which is not incompatible with fair and healthy commercial competition; not a peace of Warsaw made by desolating legislation; nor yet the *Pax Romana* of the all-conquering imperial trust. Nor do they intend to heed the plaintive voice of the spokesman for the modern Cyclops, "monstrum horrendum informe, ingens," asking the Federal Government to take it in its arms and coddle it, tell it what to do, *and "to fix prices."*

Verily extremes meet, and the monopolist and the socialist reach a common ground! For government to fix the prices of merchandise bought and sold in commerce is utterly beyond the power of any legislative body in America; and our free democratic society, based on the independence of the individual and the development and protection of individual rights, would have to be shattered to its foundations and a new social order built up, before any such proposition could be maintained.

Such a power necessarily implies the right to fix the price of human labor, not only because the price of the products of labor

cannot be fixed without indirectly fixing the proportion of the price that labor shall receive, but also because, as the liberty of the merchant, the producer and the manufacturer is as great as the liberty of the laborer, a power great enough directly to shackle their liberty is great enough directly to shackle his liberty. No free people will ever submit to any such doctrine. It is the socialism of Marx and Engel pure and simple, and may find its justification in their celebrated manifesto, but not in any of the records or documents that consecrate the rights and the political beliefs of the American citizen, undefiled by the social leprosy engendered in the Ghettos of an oppressed race, and in the hovels of a peasantry whose ancestors were *adstricti glebis* for a thousand years, and who themselves are still the hewers of wood and drawers of water for an overbearing class of oligarchic land monopolists.

May not we now add to the description of the modern Cyclops from which has come this cry for the government "to fix prices," the balance of the Virgilian hexameter just quoted, and say of it *cui lumen ademptum*"? For surely the light of American liberty does not shine for it.

It is no answer to this argument to point to the regulation by law of the charges made for gas, water, electric lighting, telephones, telegraphs, express charges, transportation and grain elevator rates. These businesses are public, or quasi-public in their nature, and most of them enjoy what has been well described as a natural monopoly. Nor can modern legislation regulating prices be supported by the precedents of the despotic governments of the middle ages, which pursued the butcher to his stall, the weaver to his loom and the baker to his oven. The police power may still touch the butcher, and the baker in the interest of public health, but it cannot fix the price of the commodities they sell. The ancient assize of bread was the last of these medieval tyrannies, and still keeps its place by immemorial custom in some cities in foreign countries. As a matter of history it persisted in my own home city of New Orleans up to thirty years ago, which may be explained by the fact that for the first eighty-five years of her existence she was a foreign city,

and it took a long time to change her municipal habits and traditions.

Of course the states by no agreement among themselves could protect their citizens against any evils arising out of the national banking laws of the United States. The establishment of a money trust among the national banks can only be prevented by the federal power.

I have already stated that there is no limitation on the capital stock of such banks, no prohibition against the holding and voting of their stock by other corporations, and no prohibition against the identity of the boards of directors of banks situated in the same locality. Consolidation is not expressly permitted, but it has been practised in round about ways, and has resulted in the creation, both in New York and Chicago, of banks of enormous capital and deposits which run into the hundreds of millions. One national bank cannot hold stock in another national bank, but this results from want of power in such a bank, to hold stock, except temporarily, in any corporation.

In the present condition of the law, it would legally be possible to create a holding company in one of the states that permit and even encourage such organizations, to purchase, own and vote the majority of the capital stock of every national bank in the United States, and such a corporation would bear the same relation to the finances of the country that the United States Steel Corporation bears to the iron and steel industry. Indeed some of the large banks are now operating a device which partakes of the nature of a holding company, accompanied by the establishment of an indissoluble tie between the stock of the bank and the stock of the so-called "securities company."

The attention of the officers of the government was called to this subject by the organization of the National City Company, in New York. Investigation by the Secretary of the Treasury, it is publicly stated, shows that there are three great holding companies of national bank and other stocks, and hundreds of smaller ones. The general plan adopted to carry out one of these schemes is for one of the great banks to declare a special dividend to stockholders. This dividend, by arrangement with the stock-

holders, is applied to the organization of a seeurities or a trust company in whieh the stockholders are the same as those of the bank. The eapital stoek of the seeurities company is then invested in the stock of other banks and eorporations, and if necessary more funds are borrowed from the parent bank on the seeurity of the stoeks purehased. Both the stoek certificates of the parent bank and of the securities company are stamped in sueh a way that the transfer of stoek in either company carries with it a transfer of a proportionate amount of stock in the other, so that the stoekholders in the parent bank and its eonnected seeurities eompany remain always the same and in the same proportion, thus establishing a eommunity of management between the parent bank, the securities company, and all the banks or eorporations whose stoeks are controlled by the securities eompany.

In view of the Knight case, whieh has never been expressly overruled, it is doubtful whether schemes of this kind are within the purview of the federal anti-trust aet, but there is no doubt that they are an ingenious subterfuge, intended to eireumvent the settled rule that one national bank eannot own stoek in another eorporation. Between the law breaker and the expounder of the law there has been since the first statute was promulgated a perpetual eontest, the one inventing plans to do indireetly what he is prohibited from doing direetly, and the other extending and developing the elemental prineiples of justiee so as to eireumvent all evasions no matter how ingeniously devised. It is therefore not probable in this matter that either the Attorney-General of the United States or the courts will eonclude that the "ingenuity of the law breaker is greater than the law." *

The differenee between this plan and that of the simple holding eompany is the linking together the stock of the parent

* This prediction of what the Attorney General of the United States would decide in this matter, was written and printed before his opinion was published. Then happened a most remarkable thing. The Secretary of the Treasury refused to accept, and act upon the opinion of the law officer of the Government, and the question was referred to the President. His conclusion is still *in petto*.

bank and the stock of the securities company, and the furnishing of the capital of the securities company by the subterfuge of a dividend. If, however, one or two of the great capitalists of the nation should in their own individual names and for their own individual purposes acquire the majority of the stock in the majority of the national banks of the United States, or even of those in any of the financial centers, it is difficult to see how in the present state of the law they could be prevented from organizing a holding company to own and vote such stocks.

A money trust controlling the liquid capital—the life-blood of the commerce of the nation, is doubtless the dream of the dominant financial magnates. If such a calamity does befall us, there will surely rise up another Andrew Jackson, with the power and the good will of the people behind him, who will throttle this new perversion of the financial laws, just as the old Andrew Jackson strangled the Bank of the United States. But the simplest and the surest way is for the Congress now to limit the capital stock of national banks, to prohibit consolidation directly or indirectly, to prohibit directors in one national bank from being directors in any other bank, state or national, to prohibit any corporation from owning directly, or through trustees or interposed persons, any of the stock of a national bank, and to prohibit the coupling of the stock of a national bank with the stock of any other company, or vice-versa.

The African wizard doctor's method of casting out devils is said to be the filling of the victim with other and different devils. On the analogy of this principle, it is proposed in some quarters that the Federal Government shall create private business corporations to engage in interstate commerce. Assuming for the moment that the government has the power to create such private business corporations, and that the object and purpose of such creation is so to control interstate commerce as to prevent all interstate commercial iniquity committed by corporations, it would be necessary to couple this creation with a prohibition against any state corporation engaging in that commerce; because in the absence of such a prohibition no capital would seek investment under a stringent federal corporation law when

it could incorporate itself under the liberal laws of the various states and have full right to engage in interstate commerce. Particularly would that capital which needs supervision and control fail to invest itself in a federal corporation.

But such a prohibition would be an economic crime. Every business corporation in the land is more or less engaged in interstate commerce. It would act as an embargo on the commercial activities of tens of thousands of corporations, extending from the great department store down to the incorporated retail shop. It would arouse an antagonism among the states so hostile that in every state such corporations would be rigidly excluded from all internal commerce. Such a law would soon become the center of political attack, and the party which would attempt to justify or maintain it would be swept from power in a whirlwind of indignation. Without such a prohibition, such a law would simply be inserting into the body politic more devils, less harmless perhaps than those already existing, but certainly without the power of driving the old ones out.

But the Congress has, under the grant to regulate interstate and foreign commerce, no constitutional power to create a private business corporation to engage in interstate and foreign commerce, and the only person who, with any seriousness, ever claimed it has such a power, so far as I know, is the former Commissioner of Corporations, Mr. Garfield. Professor Willoughby, in his recent work on the Constitution, denies the power. That no such power exists clearly appears from the opinion of Chief Justice Marshall in Osborne *vs.* The Bank of the United States, 9 Wheaton, who said:

"The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a public corporation created for public and national purposes. That the mere business of banking is of its own nature a private business and may be carried on by individuals and companies, having no political connection with the government is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. *It has never been supposed that Congress could create such a corporation.*"

That the second bank of the United States, the validity of whose charter was in issue in the Osborne case, was an instrumentality of government, and that this was the ground upon which the court justified the charter, was held in the corporation tax cases, lately decided. The Supreme Court of the United States in Farmer's Bank *vs.* Dearing, 91 U. S. 29 and in Davis *vs.* Elmira Savings Bank, 161 U. S., 283, has declared that the National Banks are instrumentalities of the Federal Government created for a public purpose. The interstate railroads and bridges chartered by the Congress are all quasi-public corporations, and the right to create them has been pitched by the Congress itself upon the interstate commerce power, the military power and the post road power. They too are instrumentalities of the Federal Government created for a public purpose, and authorized to do what the government itself could do, and for that reason are not subject to state taxation or control, as was held in California *vs.* Pacific Railroad Co., 127 U. S., p. 1. The corporation tax cases, cited as Flint *vs.* Stone, Tracey & Co., 220 U. S., 152, make it clear that business corporations organized for private purposes are not governmental agencies in any sense. Nor can a state itself by descending to the conduct of business of a private character, as the State of South Carolina did in regard to the liquor traffic, make such traffic a governmental agency. South Carolina *vs.* U. S., 199 U. S., 437.

The creation, therefore, of strictly private business corporations to engage in interstate commerce, which by no stretch of the imagination can be made instrumentalities of government, organized as an appropriate means to aid in the execution of a governmental function, cannot be justified by the doctrine or the reasoning of any of the cases heretofore decided by the Supreme Court of the United States. To establish such a power would be practically to read into the constitution the rejected motion of Madison in the convention of 1787, to give the United States power "to grant charters where the interests of the United States require and the legislative provisions of individual states may be incompetent."

But even if the radical doctrine of the New Nationalism

should prevail on this question, the scope of such federal business corporations would be extremely narrow. They would be confined to conducting intercourse and traffic, the transportation and transit of persons and property, the purchase, sale and exchange of commodities among the states and with foreign countries, with their inseparable incidents and concomitants. They could not engage in mining, manufacturing or in production of any kind, with their inseparable incidents and concomitants, because these matters are not commerce and are absolutely beyond the power of the Congress. This proposition is too well settled for discussion. The jurisprudence of the Supreme Court of the United States on this subject is summed up by Mr. Justice Jackson in the Greene case, 52 Fed. p. 113, as follows:

"Commerce among the states within the exclusive regulating power of Congress consists of intercourse and traffic between their citizens, and includes the transportation of persons and property as well as the purchase, sale and exchange of commodities. In the application of that comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation: That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another: That such commerce begins, and the regulating power of Congress attaches when the commodity, or thing traded in, commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property in the state of its destination. When the commerce begins is determined not by the character of the commodity nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of Congress attaches and continues until it has reached another

state, and become mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress; and further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sole distribution and consumption thereof in the latter state forms no part of interstate commerce."

Manufacture and production end before commerce begins, and form no part of it. They are completely under the control of the state where manufacture and production take place, and are therefore beyond the commercial power of the Federal Government. As the court said speaking through Mr. Justice Lamar in Kidd *vs.* Pearson, 126 U. S., 22:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and transportation incident thereto constitute commerce."

The same statement applies to mining, lumbering and agriculture.

If under its commercial power the Congress could charter corporations to mine, manufacture and produce, then we should have federal mines and federal factories, federal wheat farms, federal cotton plantations, federal truck gardens and federal poultry yards. These corporations could enter the states without their consent and acquire and hold their soil against their public policy and even against their prohibitory laws. And this is the *reductio ad absurdum* of the whole matter; because, if there is

any question beyond dispute, it is that a state has absolute dominion over her own soil, and no part of it can be held or owned without her consent, except by the Federal Government, or its instrumentalities for public purposes, under its sovereign power of eminent domain. It will not be for a moment contended that under the fifth amendment, or under any other power in the Constitution, express or implied, private property can be taken for a private business use. Therefore the creation of corporations by Congress under the exclusive and unlimited power to regulate commerce, and the giving of such corporations faculties which they cannot exercise except with the consent of the states expressed or implied, is an absurdity, because the essence of the right to exercise an unlimited and exclusive power is that it shall be exclusive and shall not depend in any respect upon the consent, or be liable to the prohibitions, of any other authority whatever. The barrier which marks the boundary of an exclusive power lies at that point where other powers, strong enough to eviscerate the object of its action, begin to operate. A federal private business corporation, with the power to manufacture and produce, existing outside of the District of Columbia, or a territory or an insular possession of the United States, is therefore as complete a legal absurdity as the fabled creature, woman above and fish below, is a physiological absurdity. *Risum teneatis amici?*

The Supreme Court of the United States has said that court is not the harbor in which the people can find a refuge from ill-advised, unequal and oppressive state legislation; nor ought the people of the states, who are justly proud of their independence and justly jealous of their right of self-government, to look to the Congress as such a harbor, as long as the remedial power lies with them. That the remedy for the corporation debauch from which the people of the states are now awakening lies in their own hands, I have demonstrated, and it is only necessary that such remedy be worked out by them in that spirit of amity, fraternity and consciousness of common interests and a common destiny without which the republic cannot endure.